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No. 10-

IN THE

Supreme Court of the United States

RICHARD L. COWITT, et al., as Trustees, etc.,

Petitioners,

v.

MARK REILLY, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the California Court of Appeals erred in holding, in conflict with a decision of the United States Court of Appeals for the Fifth Circuit, that a contract for the sale of residential real estate does not involve "commerce" for purposes of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*

PARTIES

The only parties to this proceeding are Petitioners, Richard and Judy Cowitt, husband and wife, Individually and as Trustees of the Cowitt Family Trust, and Respondents, Mark Reilly and Robin Morselli, husband and wife.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF APPENDICES	iv
TABLE OF CITED AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE PETITION	7
A. The Decision Below Conflicts With This Court's Decisions As Well As A Decision Of The United States Court Of Appeals For The Fifth Circuit	8
B. The Issue Presented Is A Recurring One Of Substantial Importance	10
CONCLUSION	12

TABLE OF APPENDICES

Page

APPENDIX A – OPINION OF THE CALIFORNIA COURT OF APPEAL, DATED OCTOBER 5, 2010 ..... 1a

APPENDIX B – MEMORANDUM AND ORDER OF THE SUPERIOR COURT OF CALIFORNIA, DATED SEPTEMBER 17, 2009 ..... 15a

APPENDIX C – ORDER DENYING REVIEW BY CALIFORNIA SUPREME COURT, DATED JANUARY 12, 2011 ..... 38a

APPENDIX D – ORDER DENYING PETITION FOR REHEARING BY CALIFORNIA COURT OF APPEAL, DATED NOVEMBER 2, 2010 ..... 39a

TABLE OF CITED AUTHORITIES

Page

CASES

Allied-Bruce Terminix Cos. v. Dobson,
513 U.S. 265, 115 S. Ct. 834 (1995) 7, 11

Citizens Bank v. Alafabco, Inc.,
539 U.S. 52, 123 S. Ct. 2037 (2003) 4, 7, 11

Goldfarb v. Virginia State Bar,
421 U.S. 773, 95 S. Ct. 2004 (1975) 9

Groom Resources, Ltd., LLC v. Parish of Jefferson,
234 F.3d 192 (5th Cir. 2000) 9

Howsam v. Dean Witter Reynolds, Inc.,
537 U.S. 79, 123 S. Ct. 588 (2002) 6

McLain v. Real Estate Board,
444 U.S. 232, 100 S. Ct. 502 (1980) 8, 9

Perry v. Thomas,
482 U.S. 483, 107 S. Ct. 2520 (1987) 10

Preston v. Ferrer,
552 U.S. 346, 128 S. Ct. 978 (2008) 6, 10, 11

Russell v. United States,
471 U.S. 858, 105 S. Ct. 2455 (1985) 8, 9

Cited Authorities

Page

Southland Corp. v. Keating,
465 U.S. 1, 104 S. Ct. 852 (1984) 2, 10

Valencia v. Smyth,
185 Cal. App. 4th 153 (2010)..... 4, 7

STATUTES

U.S. Const., Art. VI, Clause 2 1-2

9 U.S.C. § 1..... 2

9 U.S.C. §§ 1-19 2

9 U.S.C. § 2..... 2, 3, 7, 10

18 U.S.C. § 844(i)..... 8

28 U.S.C. § 1257(a)..... 1

Cal. Code of Civ. Pro. § 1281.2..... 3

Petitioners, Mr. & Mrs. Cowitt, respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the California Court of Appeal, *review denied* by the California Supreme Court, on the issue of Federal preemption.

OPINIONS BELOW

The *Opinion* of the California Court of Appeal, entered on October 5, 2010, is set forth at Petitioner's Appendix ("App.") A, 1a-14a.

The *Memorandum and Order* denying the Petition to Compel Arbitration by the Los Angeles Superior Court, entered on September 17, 2009, is set forth at App. B, 15a-37a.

The *Order Denying Review* by the California Supreme Court, entered on January 12, 2011, is set forth at App. C, 38a.

The *Order Denying Petition for Rehearing* by the California Court of Appeal, entered on November 2, 2010, is set forth at App. D, 39a.

JURISDICTION

The decision of the California Courts was final upon the denial of review by the California Supreme Court, entered on January 12, 2011, App. C, 38a.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a), as it involves an issue of Federal preemption under the Supremacy Clause of the U.S.

Constitution (Article VI, clause 2) and the Federal Arbitration Act, 9 U.S.C. § 2. See *Southland Corporation v. Keating*, 465 U.S. 1 (1984).

CONSTITUTIONAL PROVISION INVOLVED

The Supremacy Clause of the United States Constitution reads:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

U.S. Const., Article VI, Clause 2.

STATUTES INVOLVED

This case involves the application of the Federal Arbitration Act ("FAA"), contained in Title 9 of the United States Code ("USC") at Sections 1-19, juxtaposed against the California Arbitration Act ("CAA"), contained in California Code of Civil Procedure ("CCP") Section 1281.2.

Section 1 of the FAA provides in relevant part as follows:

> ... "commerce", as herein defined, means commerce among the several States or with

> foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Section 2 of the FAA provides in relevant part as follows:

> A written provision in any ...contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 1281.2 of the CAA provides in relevant part as follows:

> On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner

> and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:
>
> (a) The right to compel arbitration has been waived by the petitioner; or
>
> (b) Grounds exist for the revocation of the agreement. ***

STATEMENT OF THE CASE

This case concerns the issue of whether or not the sale of a single family residence involves interstate commerce, which would trigger application of the FAA in who determines the issue of waiver of arbitration, as construed by the California Court of Appeal.

The Court of Appeal held that pursuant to the most recent California precedent, in the case of *Valencia v. Smyth*, 185 Cal. App. 4th 153 (2010), the FAA does not apply to a contract involving the sale of a single family residence. App. 10a. Petitioner contends that the Court of Appeal ignored well-established federal precedent that defines the scope of what constitutes interstate commerce by failing to adhere to *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003) and its progeny.

Petitioners, Mr. & Mrs. Richard and Judy Cowitt ("Cowitts" or "Sellers") and Respondents, Mark Reilly and Robin Morselli (collectively referred to as "Buyers"), executed a standard California Association of Realtors real estate contract on June 6, 2005 containing a well-defined arbitration clause that provided as follows:

> ARBITRATION OF DISPUTES: (1) Buyer and Seller agree that any dispute or claim in Law or equity arising between them out of this Agreement or any resulting transaction, which is not settled through mediation, shall be decided by neutral, binding arbitration, including and subject to paragraphs 17B(2) and (3) below. The arbitrator shall be a retired judge or justice, or any attorney with at least 5 years of residential real estate Law experience, unless the parties mutually agree to a different arbitrator, who shall render an award in accordance with substantive California Law. The parties shall have the right to discovery in accordance with California Code of Civil Procedure §1283.05. In all other respects, the arbitration shall be conducted in accordance with Title 9 of Part III of the California Code of Civil Procedure. Judgment upon the award of the arbitrator(s) may be entered into any court having jurisdiction. **Interpretation of this agreement to arbitrate shall be governed by the Federal Arbitration Act.** [Emphasis added.]

On July 30, 2008, Cowitts were served at their retirement home in the State of Nevada with the Buyers' complaint filed June 13, 2008 in the Los Angeles Superior Court against Cowitts and various other defendants *before* the requisite neutral mediation of the dispute occurred.

Before the Cowitts responded to the complaint, Cowitts agreed with the Buyers and the other various defendants named in the complaint that were non-signatories to the arbitration agreement to participate

in a formal neutral mediation pursuant to the terms of their real estate contract. That mediation began in May, 2009, concluding with a settlement on June 4, 2009 with all defendants, excepting the Cowitts. App. 24a. When Cowitts demanded arbitration on June 9, 2009, Buyers claimed for the first time that there was a waiver, which the trial court judge ultimately agreed with in a September 17, 2009 memorandum and order, summarily disposing of that issue and denying Petitioners' request for an evidentiary hearing. App. 15a-37a.

During all of the proceedings that took place with the filing of Cowitts' petition to compel arbitration in lieu of an answer to the complaint, Cowitts repeatedly argued to the trial court judge that only an arbitrator could decide the issue of waiver in light of *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) and *Preston v. Ferrer*, 552 U.S. 346, 362-363 (2008). The trial court disagreed for two reasons: (1) The FAA applies only to the "interpretation" of the contract, which does not involve determining issues of waiver (App. 29a); and (2) *Under the FAA, there is a split in authority among the federal circuits as to whether the court or the arbitrator determines* the issue of waiver. App. 31a.

The undisputed evidence was that both Cowitts and the Buyers had executed a clear and unmistakable agreement to arbitrate a*ny dispute or claim in Law or equity arising between them* as noted above. App. 9a.

REASONS FOR GRANTING THE PETITION

In considering the scope of the FAA, this Court has interpreted the term "involving commerce" in section 2 as "the functional equivalent of the more familiar term 'affecting commerce'—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power." *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-74 (1995)). *Alafabco* emphasized that:

> [b]ecause the statute provides for "the enforcement of arbitration agreements within the full reach of the Commerce Clause," it is perfectly clear that the FAA encompasses a wider range of transactions than those actually "in commerce"—that is, "within the flow of interstate commerce." *Id.* at 56-57

In other words, the FAA applies to transactions involving an economic activity that, in the aggregate, represent a general practice subject to federal control that bears on interstate commerce in a substantial way.

The court below acknowledged that, under this Court's decision in *Alafabco*, "[t]he phrase *involving commerce* for purposes of the FAA may include an individual case which does not have a specific effect on interstate commerce *if, in the aggregate the economic activity in question would represent 'a general practice ... subject to federal control.'*" App. 9a. (citing *Alafabco*, 539 U.S. at 56-57). Embracing a decision of another panel of the California Court of Appeal, *Valencia v. Smyth*, 185 Cal. App. 4th 153 (2010), however, the court below held that the sale of

a single-family residence does not involve commerce, and the FAA therefore does not apply. App. 10a.

This Court should either summarily reverse the decision below or grant plenary review because the Court of Appeal's holding that a sale of residential real estate does not constitute "commerce" for purposes of the FAA cannot be squared with this Court's precedents and conflicts irreconcilably with a decision of the United States Court of Appeals for the Fifth Circuit.

A. The Decision Below Conflicts With This Court's Decisions As Well As A Decision Of The United States Court Of Appeals For The Fifth Circuit.

In *Russell v. United States*, 471 U.S. 858 (1985), this Court unanimously ruled that the federal arson statute, 18 U.S.C. § 844(i), covered arson to a two-unit rental apartment building. The Court's ruling solidly establishes that the housing market is within the purview of Congress' regulatory authority. Recognizing that "the statute only applies to property that is 'used' in an 'activity' that affects commerce," the Court found that "[t]he rental of real estate is unquestionably such an activity." 471 U.S. at 862.

Other cases of this Court interpreting statutes that contain jurisdictional elements like the statute involved in *Russell* likewise have held that the housing market is part of interstate commerce. For example, in *McLain v. Real Estate Board*, 444 U.S. 232 (1980), the Court reviewed a Fifth Circuit finding of no Sherman Act jurisdiction because it had not been proven that "'real estate brokers are either necessary or integral participants in the interstate aspects of residential real estate financing and

title insurance.'" 444 U.S. at 244. The Court reversed, ruling that the Fifth Circuit had disregarded the "'effect on commerce'" test. *Id.* The Court held that "[u]ltimately, whatever stimulates or retards the volume of residential sales, or has an effect on purchase price, *affects the demand for financing and title insurance*" both of which occurred in interstate commerce. *Id.* at 246 (emphasis added). *See also Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (noting that home purchases frequently entail interstate transactions, making lawyers' title inspection fee schedule subject to the Sherman Act).

In short, the decision below is flatly inconsistent with *Russell*, *McLain*, and *Goldfarb* – not to mention *Alafabco*. The Court of Appeal's decision also is in square conflict with the Fifth Circuit's decision in *Groom Resources, Ltd., LLC v. Parish of Jefferson*, 234 F.3d 192 (5th Cir. 2000). In *Groom*, the Fifth Circuit squarely held that selling a home has an aggregate impact on interstate commerce, explaining:

> Moreover, most housing purchases involve realtors, brokers, title insurance, title registration and legal fees, and may involve federally backed mortgages and the secondary mortgage market. In addition to supporting the commercial nature of a housing purchase, many of the above factors also involve actors with interstate ties. (*Id.* at 206 n.19 (citation omitted).)

The conflict between the California Court of Appeal and the Fifth Circuit is sure to breed unnecessary litigation over the applicability of the FAA to real-

estate transactions. The Court should grant certiorari to eliminate the confusion and forestall unnecessary collateral litigation.

B. The Issue Presented Is A Recurring One Of Substantial Importance

It is fair to say that no State in the Union has made more and more varied efforts to evade the FAA than California. For example, 27 years ago, after the California Supreme Court construed the California Franchise Investment Law to render claims under that law non-arbitrable, this Court exercised jurisdiction and declared that "[s]o interpreted the California Franchise Investment Law directly conflicts with § 2 of the Federal Arbitration Act and violates the Supremacy Clause." *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). Shortly thereafter, this Court again reversed a decision of the California Supreme Court holding that the California legislature has the power to declare a claim non-arbitrable—this time one to collect wages under the California Labor Code. See *Perry v. Thomas*, 482 U.S. 483 (1987). Explaining that California's "requirement that litigants be provided a judicial forum for resolving wage disputes" was in "unmistakable conflict" with Section 2 of the FAA and its underlying policy, the Court held that, "under the Supremacy Clause, the state statute must give way." *Id.* at 491. Then, only a few years ago, this Court granted certiorari and reversed a decision of the California Court of Appeal that upheld a provision of the California Talent Agents Act that required disputes under that Act to be submitted to California's Labor Commissioner in the first instance—prior to either litigation or arbitration. *Preston v. Ferrer*, 552 U.S. 346 (2008). Noting that "[t]he FAA's displacement of conflicting

state law is now 'well-established,'" the Court held that "the FAA supersedes" the California statute. *Id.* at 353, 359 (quoting *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 272 (1995).

The present case, in which the court below effectively defied this Court's holding in *Alafabco* that the term "commerce" in the FAA is to be construed exceptionally broadly, is just the latest in this ever-growing list of California cases that refuse to come to terms with Congress' intent to give federal protection to agreements to arbitrate disputes involving commerce.

The question presented is an important one that this Court should resolve to bring California into conformity with this Court's FAA jurisprudence. Absent review and reversal by this Court, California courts predictably will refuse to apply the FAA to the tens of thousands of arbitration agreements contained in California real estate contracts. The Court should grant certiorari in order to reconfirm the broad reach of the FAA and make clear once and for all that it applies to contracts for the sale of residential real estate.

CONCLUSION

The petition for a writ of certiorari should be granted and the case set for plenary review. In the alternative, the petition should be granted and the judgment below summarily reversed.

Respectfully submitted.

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APPENDIX A — OPINION OF THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DATED OCTOBER 5, 2010

COURT OF APPEAL OF CALIFORNIA,
SECOND APPELLATE DISTRICT,
DIVISION FOUR

B220439

2010 Cal. App. Unpub. LEXIS 7987

MARK REILLY, et al.,

Plaintiffs and Respondents,

v.

RICHARD L. COWITT, et al., as Trustees, etc.,

Defendants and Appellants.

October 5, 2010, Filed

NOTICE: NOT TO BE PUBLISHED IN OFFICIAL REPORTS. CALIFORNIA RULES OF COURT, RULE 8.1115(a), PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 8.1115(b). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 8.1115.

Appendix A

PRIOR HISTORY:

APPEAL from an order of the Superior Court of Los Angeles County. Super. Ct. No. BC392647. John A. Kronstadt, Judge.

DISPOSITION: Affirmed.

COUNSEL: Law Offices of Frances L. Diaz and Frances L. Diaz for Defendants and Appellants.

Snyder * Dorenfeld, David K. Dorenfeld and Michael W. Brown for Plaintiffs and Respondents.

JUDGES: EPSTEIN, P.J.; WILLHITE, J., MANELLA, J. concurred.

OPINION BY: EPSTEIN

OPINION

This is an appeal from the denial of a petition to compel arbitration. The trial court found that appellants waived their right to arbitrate. We agree and affirm the order.

FACTUAL AND PROCEDURAL SUMMARY

In July 2005, respondents Mark Reilly and Robin Morselli purchased a single family home in Agoura Hills from appellants Richard L. Cowitt and Judith A. Cowitt, individually and as cotrustees of the Richard and J.A. Cowitt Family Trust. The standard form residential

purchase agreement published by the California Association of Realtors was used for the transaction. This agreement contained a provision for alternative dispute resolution. The parties agreed to mediate any dispute before resorting to arbitration or court action, and pursuant to a separately initialed arbitration provision, they agreed that any dispute not resolved by mediation would be submitted to neutral binding arbitration.

In June of the following year, respondents notified appellants and the real estate agents of various problems with the property, including drainage issues and excessive noise from neighbors. They asserted these were defects which should have been disclosed, but were not. Respondents made informal efforts to resolve the dispute, but ultimately retained attorney Brian Kahn to assist them.

In December 2006, Mr. Kahn wrote a letter to Frances Diaz, appellants' counsel, setting out the problems with the property and demanding mediation. After several telephone conversations, an informal mediation session was scheduled for March 2007, then was rescheduled for April 4, 2007. The mediation was conducted but no settlement resulted.

The attorneys exchanged several emails and telephone calls over the next few months. On July 24, 2007, Mr. Kahn sent a letter to Ms. Diaz demanding arbitration. She responded that the arbitration demand was premature because there had not been a mediation with a professional mediator, as required under the purchase agreement.

Mr. Kahn responded by letter that he and respondents considered the April mediation sufficient to satisfy the contract requirements. Despite this position, he proposed that appellants select a mediator from an enclosed list. Ms. Diaz agreed to the use of Deborah Rothman as mediator. On September 26, 2007, Mr. Kahn sent a letter to Ms. Diaz regarding Ms. Rothman's availability in November or December. The mediation was never scheduled. According to Mr. Kahn, Ms. Diaz never responded to his September letter. According to appellants, respondents failed to arrange the mediation.

Respondents relieved Mr. Kahn and retained new counsel. On June 13, 2008, respondents filed this action against appellants, their real estate agents, respondents' real estate agent, real estate broker, and the home inspector hired by respondents.

On October 21, 2008, the matter came on for a case management conference before Judge (now Justice) Elizabeth Grimes. Counsel for respondents did not appear. Ms. Diaz appeared for appellants. Counsel for defendant Coldwell Banker requested a continuance because its cross-complaint had not yet been answered and there was a defendant who had not yet been served. Ms. Diaz agreed: "I think continuing this conference at least 45 days would really be important because we don't even have all the parties." The court continued the conference to December.

At the December 3, 2008 case management conference, Judge Grimes began to discuss available dates in June 2009. Appellants' counsel asked, "A June date for what?"

The court explained it was for trial, at which point Ms. Diaz told the court "the matter had been agreed upon as requiring mediation" before going to trial. The court replied, "Yes, I'll refer you to mediation, but if that fails, you'll need a trial, won't you?" Ms. Diaz responded, "It was my understanding that the plaintiffs' attorney had agreed that all the parties have to submit to mediation prior to having the matter set before the superior court because of the real estate contract." To this, the court replied, "Who do you think I am?"

Respondents' counsel, David Dorenfeld, corrected Ms. Diaz's statement. "There was a prelitigation mediation in compliance with the agreement. I agreed with counsel that we would try to mediate again, but it was not in any way imposing on the court to postpone a trial date." The court observed that "the likelihood of this case going to trial is less than 99.9 percent." But the court also observed that "nothing gets a case settled more than a firm trial date in a department where the judge is known for not continuing cases." To this, Ms. Diaz replied, "June would be fine with me, your honor." After further discussion of dates, the court set July 20, 2009 for trial. Ms. Diaz stated, "Good for me, your honor."

Mr. Dorenfeld asked for a referral to mediation "with a cutoff date, and I think that we probably would select a private mediator." The court asked what cutoff date to order. Ms. Diaz replied, "I think it would be a good thing, the sooner the better. Perhaps February 28th?" Respondents' counsel agreed, but counsel for Coldwell Banker asked to move it to April so that she could complete

"a little discovery . . . ." The court set a 120-day deadline of April 2, and encouraged the parties to resolve the case.

Coldwell Banker noticed the depositions of respondents for early March 2009. Appellants' counsel was present and asked questions at each deposition. Appellants were also served with respondents' written discovery responses and with their designation of expert witnesses.

On April 17, respondents' counsel sent a letter to all counsel indicating a May 15, 2009 mediation date was set. The mediation was conducted on that date, but settlement was not reached with appellants. The matter was resolved as to all other defendants by written settlement agreement; notice of the settlement was filed on June 4, 2009. Appellants filed a petition to compel arbitration on June 9, just six weeks before the July 20 trial date.

The petition to compel arbitration came on for hearing on July 6, 2009, before Judge John Kronstadt.[1] The court was concerned about whether appellants had informed Judge Grimes of their intent to seek arbitration, or their position that arbitration was mandatory. Ms. Diaz admitted it was not stated "in those words" but asserted Judge Grimes was aware of their position. The court continued the matter in order to obtain the transcripts of those hearings.

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1. The settling parties filed for determination of good faith settlement, which came on for hearing at the same time as the motion to compel arbitration.

Appendix A

At the continued hearing on July 10, 2009, the court explained that the transcript of the December hearing did not support appellants' claim. The court denied the petition to arbitrate, finding that appellants had waived their contractual right to arbitration by participating in the litigation, failing to inform the court at the case management conference of their intent to seek arbitration, agreeing to a trial date, participating in discovery, and waiting until the very eve of trial to seek arbitration. The court also found prejudice would occur because the matter had been prepared for trial. Ms. Diaz asked for an opportunity to submit the transcript from the October hearing before Judge Grimes, during which she believed "Judge Grimes was told that this is a real estate contract that involves an arbitration." The court agreed to consider the additional transcript.

After reviewing the transcript of the October hearing, the court found nothing that warranted a change in its ruling. The court then set a March 2010 trial date. The court filed a "Memorandum and Order" setting out its ruling on September 17, 2009. Appellants filed a timely appeal from the order denying their petition to compel arbitration.

DISCUSSION

I

The trial court denied appellants' petition based on its determination that appellants had waived their right to arbitration. Appellants claim the question of waiver should

have been decided by an arbitrator, not the court because the dispute was governed by the Federal Arbitration Act (FAA) (9 U.S.C. §§ 1-16).

Under the California Arbitration Act (CAA) (Code Civ. Proc., § 1280 et seq.), it is the court that decides whether the right to compel arbitration has been waived by the petitioner.[2] But where the FAA applies, courts are divided on whether the question of waiver should be decided by the arbitrator or the court. (Knight et al., Cal. Practice Guide: Alternative Dispute Resolution (The Rutter Group 2008) P 5:172, pp. 5-131 to 5-132 (rev. # 1, 2008).) We need not choose a side in this dispute, because the FAA does not apply to this contract.

The FAA provides that a "written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

---

2. "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: [P] (a) The right to compel arbitration has been waived by the petitioner . . . ." (Code Civ. Proc., § 1281.2. subd. (a).)

(9 U.S.C. § 2.) The phrase "involving commerce" for purposes of the FAA may include an individual case which does not have a specific effect on interstate commerce "if, in the aggregate the economic activity in question would represent 'a general practice . . . subject to federal control.'" *(Citizens Bank v. Alafabco, Inc.* (2003) 539 U.S. 52, 56-57.) The sale of a single family residence in California, without more, does not meet that standard.

Appellants rely, instead, on a portion of the arbitration provision stating: "Interpretation of this agreement to arbitrate shall be governed by the Federal Arbitration Act." This sentence is part of the arbitration provision contained in the 2002 version of a standard form residential purchase agreement published by the California Association of Realtors. The arbitration clause also provides: "Buyer and Seller agree that any dispute or claim in Law or equity arising between them out of this Agreement or any resulting transaction, which is not settled through mediation, shall be decided by neutral, binding arbitration, . . . The arbitrator . . . shall render an award in accordance with substantive California Law. The parties shall have the right to discovery in accordance with California Code of Civil Procedure § 1283.05. In all other respects, the arbitration shall be conducted in accordance with Title 9 of Part III of the California Code of Civil Procedure. Judgment upon the award of the arbitrator(s) may be entered into any court having jurisdiction."

The agreement continues: "'NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING

OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. . . . IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE CALIFORNIA CODE OF CIVIL PROCEDURE.'" This provision was initialed by appellants and respondents.

The same standard form contract, including an identical arbitration provision, was considered by Division 1 of this district in *Valencia v. Smyth* (2010) 185 Cal. App.4th 153. The court held the invocation of the FAA for purposes of interpretation of the agreement was not a designation of the procedural provisions of the FAA to control the arbitration. "[B]y adopting the FAA for purposes of contract interpretation, the parties did not displace the procedural provisions of the CAA. Both the FAA and the CAA employ the *same* principles of contract interpretation. Thus, regardless of which act governs the interpretation of the Agreement, the result is the same: Under the 'plain meaning' rule, the Agreement's choice-of-law provision requires the application of the CAA's procedural provisions." (Id. at p. 157.)

We reach the same conclusion. The agreement expressly selects the substantive and procedural law of California. It invokes the FAA only with respect

to the interpretation of the agreement. The question whether appellants waived their right to enforce the arbitration agreement did not require interpretation of the agreement; instead it required an evaluation of appellants' conduct. The parties did not agree to have that determination made under the FAA. As the United States Supreme Court explained in *Volt Info. Sciences v. Leland Stanford Jr. U.* (1989) 489 U.S. 468, 479, arbitration under the FAA "is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, [citation], so too may they specify by contract the rules under which that arbitration will be conducted." Under the choice of law provision in the arbitration agreement, California law was to be applied to all issues except the interpretation of the agreement. The FAA thus did not apply to resolution of the question of waiver.

II

We turn to the court's finding of waiver.[3] "Generally, the determination of waiver is a question of fact, and the trial court's finding, if supported by substantial evidence, is binding on the appellate court." *(St. Agnes, supra,* 31 Cal.4th at p. 1196.)

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3. In the arbitration context, the term "waiver" is a shorthand statement for the determination that a contractual right to arbitrate a dispute has been lost. *(St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195, fn. 4 (St. Agnes).)

Appendix A

In *Saint Agnes*, the Supreme Court explained that "no single test delineates the nature of the conduct that will constitute a waiver of arbitration." (Id. at p. 1195.) The court adopted several factors to be considered in assessing waiver claims: "'"(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether 'the litigation machinery has been substantially invoked' and the parties 'were well into preparation of a lawsuit' before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) 'whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place'; and (6) whether the delay 'affected, misled, or prejudiced' the opposing party.'"'" (Id. at p. 1196.)

The trial court found several of these factors were present in this case, and the evidence supports this conclusion. Appellants' conduct was inconsistent with an intent to arbitrate. The parties engaged in an unsuccessful mediation session in April 2007. Appellants then rejected respondents' request to arbitrate as premature, asserting there had not been a formal mediation as required as a prerequisite under the agreement. Although respondents agreed to a second mediation, efforts to schedule it failed. Had appellants had an interest in arbitrating the action, they could have acceded to respondents' request, or pursued the second mediation; they did neither.

Appendix A

Even after respondents filed this lawsuit, appellants' conduct was inconsistent with the right to arbitrate. Their counsel attended two case management conferences and agreed to a trial date without once mentioning to the court that they intended to arbitrate the dispute. Even when counsel indicated appellants' desire to mediate, she gave no suggestion that if the case did not settle, the next step would be arbitration rather than trial. Instead, she agreed to a trial date.

The litigation machinery had been "substantially invoked" at the time appellants sought arbitration. The trial date was just six weeks away, discovery had been conducted, respondents had designated their expert witnesses. By that time, none of the benefits of arbitration, "as a speedy and relatively inexpensive means of dispute resolution" *(Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9-10), would be realized. The court addressed this circumstance in *Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 997: "We acknowledge that arbitration is the preferred method of resolving disputes. However, the benefits it can provide, to both the parties and an already overburdened judicial system, become illusory when there is a failure to timely and affirmatively implement the procedure."

We find substantial evidence supports the trial court's finding that appellants waived their right to arbitrate.

Appendix A

DISPOSITION

The order is affirmed. Respondents are to have their costs on appeal.

EPSTEIN, P.J.

We concur:

WILLHITE, J.

MANELLA, J.

APPENDIX B — MEMORANDUM AND ORDER OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, DATED SEPTEMBER 17, 2009

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

BC392647

MARK REILLY ET AL.,

VS.

RICHARD L. COWITT ET AL.

NATURE OF PROCEEDINGS:
STATEMENT OF DECISION RULING

The Court having taken the matter of the Statement of Decision under submission on August 30, 2009, now issues the MEMORANDUM AND ORDER this date.

The Court denies the Cowits' Petition to Compel Arbitration. The right to demand arbitration was waived. This matter will proceed to trial on the schedule previously established by the Court at the July 23, 2009 hearing which is March 1, 2010.

The order is more fully reflected in the MEMORANDUM AND ORDER which is filed this date and incorporated herein by reference.

Appendix B

MEMORANDUM AND ORDER

I. *Background*

Between July 6 and July 23, 2009, this Court conducted a series of hearings in this matter with respect to the following issue: Whether to grant the Petition to Compel Arbitration filed by defendants Richard Cowitt, Judith Cowitt, and certain family trusts that they had established (collectively the "Cowitts")? Ultimately, the Court denied the Petition for reasons set forth in detail on the record at certain of the hearings. At the request of Cowitts, the Court issues this written ruling with respect to its findings and orders. To facilitate that process, and notwithstanding that the Court has determined: (i) the Cowitts waived the right to request a Statement of Decision by failing to make a timely request; (ii) even absent such a waiver, a written Statement of Decision would not have been required in this matter because the proceedings were completed in less than a day; and (iii) the Court previously presented detailed, on the record explanations of its findings in the matter, i.e., the equivalent of an oral Statement of Decision, the Court directed that the non-moving parties -- plaintiffs Mark Reilly and Robin Morselli (collectively "Plaintiffs") -- prepare a proposed written order in the form of a Proposed Statement of Decision and that the Cowitts then file any objections, following the procedures used in the statement of decision process as set forth in Cal. Rule of Court 3.1590. Thereafter, Plaintiffs lodged a "[Proposed] Order" on or about July 27, 2009, and

the Cowitts filed and "Objection to Plaintiffs' Notice of Ruling..." on July 30, 2009.[1]

Having considered the parties' competing submissions, the Court now issues this written order. The Court adheres to its prior oral orders that the Petition of the Cowitts shall be denied. The matter is to proceed to trial consistent with the schedule set by the Court at the hearing on July 20, 2009.

II. *Procedural History*

This action arises from Plaintiffs' purchase of a single family residence from the Cowitts. The sales transaction occurred in June 2005. The property is located in Agoura Hills, California. Plaintiffs contend that the house had certain defects that were not disclosed to them prior to the purchase Plaintiffs' primary complaints arise from: (i) an alleged slow drainage system; and (ii) noisy neighbors. In addition to the Cowitts, the complaint in this action named as defendants: (i) Coldwell Banker (the Plaintiffs' real estate agency in the sales transaction) and the

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1. On August 12, 2009, without seeking leave of the Court to allow a variance from the briefing process that the Court ordered on July 23, 2009, the Cowitts filed a counter-Proposed Statement of Decision. The Plaintiffs objected to the August 12, 2009 filing in their August 25, 2009 "Objections to Seller Defendants' Proposed Statement of Decision. On August 31, 2009, the Cowitts filed a "Reply to Plaintiffs' Objections filed August 25, 2009...." Again, this pleading was not presented with approval of the Court. Consequently, the Cowitts' August 12 and August 25 submissions are stricken.

individual agent from that firm; (ii) Pickford Real Estate (the Cowitts' real estate agency in the sales transaction) and the individual agent from that firm; (iii) the person who inspected the home prior to the sales transaction; and (iv) the entity that employed the home inspector.

A. *Pre-Litigation Settlement Efforts*

Prior to the initiation of this litigation -- the Cowitts filed their complaint on June 13, 2008 -- the parties made certain efforts with respect to a possible informal resolution of the underlying disputes. Declaration of Brian Douglas Kahn (filed, June 19, 2009). Kahn Decl.4 & Ex. A. Thus, by letter dated December 5, 2006, Kahn, who was then Plaintiffs' counsel, wrote to Ms. Diaz ("Diaz"), counsel to the Cowitts, about the issues arising from the sale. At the conclusion of the letter he demanded mediation. By letter dated February 28, 2007, Kahn sent a written confirmation to Diaz that a mediation was to proceed on March 6, 2007. Kahn Decl. Ex. B. Subsequently, counsel for the parties exchanged writings about a possible rescheduling of the mediation. Kahn Decl. ¶¶ 7-9 & Exs. C-D. A mediation was conducted on April 4, 2007. No settlement resulted.

On July 24, 2007, Plaintiffs demanded that an arbitration proceed. Kahn Decl. ¶ 14 & Ex. F. Thereafter, Diaz informed Plaintiffs' counsel that the arbitration demand was premature because there had not been a mediation as required under the parties' written contract. In an August 6, 2007 letter, Kahn advised Diaz that Plaintiffs contended that the prior mediation was sufficient to satisfy the terms of the parties' contract. Kahn Decl.

Ex. G. Nonetheless, in the August 6, 2007 letter, Kahn proposed that the Cowitts examine an enclosed list of possible mediators should there be another session. *Id.* By letter dated September 26, 2007, Kahn advised Diaz that Plaintiffs would agree to another mediation in November or December 2007, with Deborah Rothman as the mediator. Kahn Decl. Ex. H. The parties dispute what happened next. Plaintiffs contend that the Cowitts refused to proceed in good faith with the scheduling of the mediation ("I never received any response from Ms. Diaz confirming the use of Ms. Rothman and responding to the dates provided in my September 26 [,2007] letter.") Kahn Decl. ¶19. The Cowitts contend that Plaintiffs refused to proceed with the further mediation ("even though Petitioners remained ready willing, able and agreeable to using mediator Rothman, Petitioners [sic] abandoned the mediation process without notice or excuse.") Petition to Compel Arbitration ¶ 4 (filed, June 9, 2009).

B. *Court Proceedings*

1. *Commencement of Action and Case Management Conferences*

As stated above, Plaintiffs filed their complaint in this action on June 13, 2008. On October 21, 2008, the matter came on for a Case Management Conference before Judge Grimes, who was then assigned to Department 30. Counsel for the Cowitts appeared along with counsel for the Caldwell Banker parties. Counsel for Plaintiffs did not appear. Prior to the hearing, Diaz, counsel for the Cowitts, apparently presented to the court clerk her business card on which someone wrote, "Spec. Appear." During the brief

hearing, counsel for Coldwell Banker stated that a cross-complaint was pending against the Prudential parties, and recommended that the conference be continued for 30 to 45 days. Diaz, who never stated on the record that she was making a "special appearance," concurred, stating: "Your Honor, if I may, I think continuing this conference at least 45 days would be really important because we don't even have all the parties." Tr. 2:5-7. In response to these two proposals, Judge Grimes ordered that the Case Management Conference be continued to December 3, 2008, and that any party who had not filed a Case Management Statement was to do so in advance of that hearing. Diaz did not object, and stated that she would attend the December 3, 2008 hearing. Tr. 2:27- 3:7.

On December 3, 2008, counsel for all parties appeared, and various dates were designated by Judge Grimes for future proceedings in the matter. Again, Diaz, counsel for the Cowitts, apparently considered hers as a "special appearance," by a notation with those words on her business card, but again she made no statement to that effect on the record in order to inform Judge Grimes of her position. At the December 3 hearing, Judge Grimes set the matter for trial. During the December 3, 2008 proceedings, the following colloquies occurred between Judge Grimes and other counsel, including Diaz:

> THE COURT: So shall we have a good time trying to pick a [trial] date that all of you find agreeable? I know June 6 [,2009] — I mean June 3 [,2009] does not work. Do you want another date in June if we can offer you a June date?

MS. DIAZ: A June date for what? I'm sorry.

THE COURT: Trial.

MS. DIAZ: Oh, Your Honor, the matter has been agreed upon as requiring mediation before going --

THE COURT: Oh, of course.

MS. DIAZ: -- to trial.

THE COURT: Yes, I'll refer you to mediation, but if that fails, you'll need a trial, won't you?

MS. DIAZ: It was my understanding that the plaintiffs' attorney had agreed that all the parties have to submit to mediation prior to having the matter set before the Superior Court because of the real estate contract.

THE COURT: Who you do you think I am?

MS. DIAZ: I know.

MR. DORENFELD [Plaintiff s counsel]: No, Your Honor. This is David Dorenfeld. That's not accurate. There was a pre-litigation mediation in compliance with the agreement. I agreed with counsel that we would try to mediate again, but it was not in any way imposing on the Court to postpone a trial date.

THE COURT: Right. Well, obviously this case — I mean, the likelihood of this case going to trial is less than 99.9 per cent. You know, what I mean to say is it's less than 1 percent.

MS. DIAZ: I agree with you, Your Honor.

THE COURT: But, nothing gets a case settled more than a firm trial date in a Department where the judge is known for not continuing cases.

MS. DIAZ: You know, June would be fine with me, Your Honor.

. . .

THE COURT: So, the case is set for jury trial on July 20 of next year [2009]...with a Final Status Conference on July 10 [,2009]....

. . .

THE COURT: ...Do you want me to refer you to mediation, or is that already set up?

MR. DORENFELD: It's not set up, Your Honor.

THE COURT: Okay.

MR. DORENFELD: We would like a referral to mediation with a cutoff date, and I think that we probably would select a private mediator.

THE COURT: That would make sense, don't you think, a private neutral? Does everyone agree to that?

MS. LIE: We don't have authority at the moment, but we can discuss that with counsel.

THE COURT: All right. At this time, I'm not going to refer you to Court Services. Keep in mind that in the unlikely event that you're unable to agree on a private neutral, that if you seek an order of referral to Court Services, they will need at least 60 days' notice. ... So what cutoff date shall I order?

MS. DIAZ: I think it would be a good thing, the sooner the better. Perhaps February 28 [,2009].

THE COURT: Okay. Does that make sense with everyone?

MR. DORENFELD: That's fine, Your Honor.

MS. BULLOCK: I'd like to complete a little discovery before we — a depo or two before we jump into mediation, so if we can move it to early April.

THE COURT: All right. I'll give you a 120-day deadline of April 2 [,2009]. And, as I've said earlier, that's not an appearance date, but it is a court-ordered deadline, so you should probably select your mediator as soon as possible... This

> really is a case that certainly plaintiffs, but also the defendants, will want you to help them resolve quickly, I think.
>
> MS. DIAZ: I agree with you, Your Honor. Thank you.

2. *Mediation and Petition to Compel Arbitration*

The parties ultimately mediated the matter a second time on May 15, 2009. The matter did not settle as to the Cowitts. It was, however, resolved as to all other defendants, which resulted in the filing a Notice of Settlement on June 4, 2009, and separate motions for a determination of good faith settlement that were filed, respectively, on June 10 and 15, 2009. On June 9, 2009, the Cowitts filed a Petition to Compel the arbitration of the claims against them.

3. *The Hearings on the Petition to Compel Arbitration*

The Court conducted the first hearing on the Cowitts' Petition on July 6, 2009. At that time, the Court raised a series of questions with each side concerning the prior proceedings in the matter, including the positions each had taken before Judge Grimes at the December 3, 2008 Case Management Conference.[2] The Court did so to explore the

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2. At the time of the July 6, 2009 hearing, neither the Court nor any counsel had a transcript of the prior proceedings before Judge Grimes, which are detailed above.

issues with respect to whether there had been a waiver by the Cowitts of a contractual right to arbitration. Tr. 20:16-21:14. Specifically, the Court asked Diaz, "Why didn't Judge Grimes get told, 'We object to having a trial set. We plan to file a Petition to Compel Arbitration if the case isn't settled at mediation?'" Tr. 22:14-18. Diaz responded by stating: "Judge Grimes was clearly advised that the seller defendants were demanding mediation." Id. lines 19-20. The Court then re-asked its question as follows: "Did you tell Judge Grimes, 'We object to having a trial date set because we plan to seek arbitration in the event mediation is not successful?'" Tr. 23: 1-3. Diaz responded, "No, Your Honor, not in those words." Id line 4. When the Court asked what words were used and whether as a result of those words, Judge Grimes was advised of the Cowitts' position as to mandatory arbitration, Diaz responded that Judge Grimes knew of that position. Tr. 23: 7. When the Court then ordered that a transcript of the December 3, 2008 proceeding be provided, Diaz stated: "Your honor, I concede that at the Case Management Conference, there was probably no discussion other than we all agreed to mediation December 3rd." Tr. 23:28- 24:2.

Later in the proceeding, Diaz stated: "When the trial was set, it was a trial set for the benefit of the brokers and the home improvement defendant." Tr. 40:22-24. When the Court noted that Diaz was present at the hearing, she responded as follows: "I did not participate because I only made a special appearance claiming that we had to mediate first and then arbitrate." Id. lines 26-28. Based on this exchange as well as the showing that Diaz had, on behalf of the Cowitts, appeared at two depositions

notic .d in the court proceedings, and posed questions at least one of them,[3] and in view of the late-filing of the Petition as well as the imminent trial date of July 20, 2009, the Court stated its tentative view that there had been a waiver of the contractual right to arbitration. However, the Court stated that it would defer a final decision until reviewing the transcript of the December 3, 2008 hearing. In addition, the Court stated that it would review the questions whether the Federal Arbitration Act (the "FAA") or the California Arbitration Act, Cal. Code of Civ. Proc., Part 3, Title 9, Ch. 1-5 (the "CAA") applied in connection with the determination of the issues raised on the Petition, including whether the issue of waiver is decided by the court or an arbitrator.

The Court conducted the second hearing in this matter on July 10, 2009. At that time, a transcript of the December 3, 2008 hearing was provided to the Court. Having reviewed that transcript, the Court set forth in detail its views as to the applicable law and the basis for its conclusion that there had been a waiver of the contractual right to arbitration. As the Court stated at that time, the transcript did not support the Cowitts' contentions

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3. The discussion of this issue at the July 6 hearing included the following exchange between Diaz and the Court: The Court: "Why did you, the defendant sellers, participate in discovery? Ms. Diaz: "We did not, Your Honor." The Court: "Did you attend any depositions?" Ms. Diaz: "Yes, an appearance at two depositions. I hardly call that a meaningful ..." The Court: "Did you ask any questions?" Ms. Diaz: "Yes, I did, Your Honor, at the second deposition. Ms Bullock [counsel for defendant, Caldwell Banker] was gone that morning. I was asked to take over the questioning so that we wouldn't waste any time." Tr. 21:25 — 22:7.

made at the July 6 hearing. At the request of Diaz, the Court agreed to receive from her a copy of the transcript of the October 21, 2008 Case Management Conference before Judge Grimes after she stated that she believed, to the "best of [her] recollection" that "Judge Grimes was told that this is a real estate contract that involves an arbitration." Tr. 12:7-10. The Court stated that it would review that transcript, which was to be provided to the Court by July 20, 2009, and determine if its contents were such that any further hearing would be required or if the Court would adhere to the views expressed at the July 10 hearing.

On July 20, 2009, the Court received the transcript of the October 21, 2008 hearing before Judge Grimes. The Court found that there was nothing in that transcript that warranted any change in the Court's July 10, 2009 rulings in which it denied the Petition. Again, the transcript was not consistent with Diaz's memory of what was said at the hearing. At that point, for the first time, Diaz requested a Statement of Decision. After she stated that she did not believe the Cowitts were entitled to a Statement of Decision because the matter was not a trial of more than a day (Tr. 8:3-5), the Court stated that a trial of less than a day may be one in which a Statement of Decision is appropriate and directed Diaz to research the issue and follow the appropriate procedures if she deemed them applicable. Finally, the Court set a trial date of March 1, 2010, after conferring with counsel for the Cowitts about any further discovery that was requested. In selecting this date, which was more than seven months after the original date set by Judge Grimes, the Court was responding to

the Cowitts' request for the opportunity to conduct further discovery and to pursue other pre-trial matters.

III. *Analysis*

A. *Statement of Decision*

Section 1291 of the Code of Civil Procedure ("CCP") provides that, "[a] statement of decision shall be made by the court, if requested pursuant to Section 632, whenever an order...is made that is appealable under this title." CCP § 1294 provides that [a]n aggrieved party may appeal from: "[a]n order dismissing or denying a petition to compel arbitration." These provisions warrant a request for a statement of decision with respect to an order denying a petition to compel arbitration. Under the terms of CCP 632, however, in a matter in which the trial is concluded in less than a day, or in less than eight hours where the trial proceeds on more than one day, the request for a statement of decision must be made "prior to the submission of the matter for decision." In addition, the request must "specify those controverted issues as to which the party is requesting a statement of decision."

A failure to make a timely request for a statement of decision results in a waiver of the rights set forth in Section 632. *In re Marriage of Steinberg* (1977) 66 Cal. App. 3d 815, 822. The Court may exercise its discretion to excuse such a waiver. Here, the Court declines to do so for three reasons. First, in its oral rulings as well as in this written order, the Court has provided considerable detail as to its findings. This has provided the Cowitts with the essential benefits, if not the precise equivalent, of the oral statement

of decision to which they would have been entitled through a timely request. Second, the Cowitts not only failed to make a timely request, they did not specify the issues as to which the statement of decision was requested. Third, the Cowitts have provided no explanation for the failure to make a timely or proper request.

B. *The Contractual Right to Arbitration Was Waived by the Cowitts*

1. *The Applicable Law*

The first issue to address is whether the CAA or the FAA applies with respect to the consideration of the waiver issue. The Court concludes that the FAA does not apply for two principal reasons:

First, the contract itself refers to the Federal Arbitration Act. It says that: "[i]nterpretation of this agreement to arbitrate shall be governed by the Federal Arbitration Act." (Italics added.) Determining whether there has been a waiver of the contractual right does not require an interpretation of the contract. Rather, in this case, whether the Cowitts waived their contractual rights turns on an evaluation of their conduct that occurred in connection with proceedings and discovery that occurred in this court action. See *Ehleiter v. Grapetree Shores, Inc.* (3d Cir. 2007) 482 F. 3d 207, 221-23 (an issue that is presumptively for the court to decide will not be referred to an arbitrator absent "clear and unmistakable evidence" of such an intent expressed in the parties' arbitration agreement. A provision stating that the arbitrator would decide "the issue of arbitrability" was not sufficient to meet

this standard). Therefore, absent an express agreement to apply the FAA to the waiver issue, for the Cowitts to establish the applicability of the FAA, they were required, as part of their petition to compel arbitration, to submit evidence demonstrating that the underlying contract involves interstate commerce. They presented no such evidence. Moreover, because that contract concerned the sale of a single family residence in California, on its face it did not concern interstate commerce;

Second, the contract also calls for the application of the CAA, which is to be the governing statute with respect to the arbitration process. Thus, the contract provides that: "[t]he parties shall have the right to discovery in accordance with California Code of Civil Procedure §1283.05. In all other respects, the arbitration shall be conducted in accordance with Title 9 of Part III of the California Code of Civil Procedure." This provision establishes that the FAA is not to be the exclusive statute that governs the parties' agreement.

Furthermore, even if the FAA were to apply to the issue of waiver, the substantive standards under the FAA and California law with respect to that issue are largely, if not entirely, overlapping. *Compare Britton v. Co-op Banking Group* (9th Cir. 1990) 916 F. 2d 1405, 1412 and *American Recovery Corp. v. Computerized Thermal Imaging, Inc.* (4th Cir. 1996) 96 F. 3d 88, 96 with *St. Agnes Med. Group, Inc. v. Pacificare* (2003) 31 Cal. 4th 1187.

2. *The Determination of Waiver*

There are differences between federal and California law in terms of who determines waiver. Under the CAA, the court determines waiver. CCP § 1281.2 ("the court shall [compel arbitration] ...unless it determines...the right to compel arbitration has been waived"; *Engalla v. Permanente Med. Group, Inc.* (1997) 15 Cal. 4th 951, 982. Under the FAA, there is a split in authority among the federal circuits as to whether the court or the arbitrator determines that issue. In the Ninth Circuit, the court determines the issue. *Cox v. Ocean View Hotel Corp.* (2008) 533 F. 3d 1119, 21.[4] The Eighth Circuit has held otherwise. *Nat'l Amer. Ins. Co. v Transamerica Occidental Life Ins. Co.* (8th Cir. 2003) 328 F. 3d 462. Because this Court finds the analysis in Cox persuasive and because the decision is consistent with California law on the issue,[5] if the FAA were deemed to apply in this matter, the Court would have followed Cox. Accordingly, the outcome here would have been the same with respect to who would make the determination of waiver.

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4. The decision on this issue was on a 2-1 vote, with Judge O'Scannlain dissenting. The Third Circuit reached a similar conclusion in *Ehleiter v. Grapetree Shores, Inc.* (3d Cir. 2007) 482 F. 3d 207, 217-18. Accord *Marie v. Allied Home Mortgage* (1st Cir. 2005) 402 F. 3d 1.

5. In this regard, it is noteworthy that, although the court's analysis was presented under the FAA, the contract at issue in Cox expressly provided that "The validity, interpretation, enforceability, and the performance of this agreement shall be governed and construed in accordance with the law of the State of California." 533 F.3d at 1117.

Appendix B

3. *The Standards for Determining Waiver*

Like other contractual terms, the right to arbitration may be waived. *Gunderson v. Superior Court* (1975) 46 Cal.App.3d 138, 143 ("[a]rbitration is a recognized and favored means by which parties expeditiously and efficiently may settle disputes which might otherwise take years to resolve. [Citations.] But this right may be lost, as any contractual right which exists in favor of a party may be lost, through a failure properly and timely to assert this right. ... If a party wishes to compel arbitration, he must take active and decided steps to secure that right. ..."); *Davis v. Blue Cross of No. Calif.* (1979) 25 Cal. 3d 418, 425[6]; C.C.P § 1281.2.[7] Because arbitration is a favored

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6. As that court explained: "In the past, California courts have found a waiver of the right to demand arbitration in a variety of contexts, ranging from situations in which the party seeking to compel arbitration has previously taken steps inconsistent with an intent to invoke arbitration (see, e.g., *Case v. Kodota Fig. Assn.* (1950) 35 Cal.2d 596, 606 [220 P.2d 9121; *Local 659, LA.T.S.E. v. Color Corp. Amer.* (1956) 47 Ca1.2d 189, 194-199 [302 P.2d 2941; *Bodine v. United Aircraft Corp.* (1975) 52 Cal.App.3d 940, 945-946 ,125 Cal.Rptr. 3441) to instances in which the petitioning party has unreasonably delayed in undertaking the procedure. (See, e.g., *Sawday v. Vista Irrigation Dist.* (1966) 64 Cal.2d 833, 836-837 [52 Cal.Rptr. 1, 415 P.2d 8161; *Brunzell Constr. Co. v. Harrah's Club* (1967) 253 Cal.App.2d 764, 778-779 [62 Cal.Rptr. 505].) The decisions likewise hold that the "bad faith" or "wilful misconduct" of a party may constitute a waiver and thus justify a refusal to compel arbitration. (*Local 659, LA.T.S.E. v. Color Corp. Amer., supra*, 47 Ca1.2d 189, 196.)"

7. "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the

remedy, a waiver will not be found without a substantial factual basis. Accordingly, the party who asserts that a waiver has occurred, "bears a heavy burden of proof." *Saint Agnes Med. Ctr. v. PacifiCare of Calif.* (2003) 31 Cal. 4th 1187,1195. In St. Agnes, the court approved several factors identified in *Sobremonte v. Superior Court* (1998) 61 Cal. App. 4th 980, that can be considered in determining whether there has been a waiver:

1. "'whether the party's actions are inconsistent with the right to arbitrate";

2. "'whether "the litigation machinery has been substantially invoked" and the parties "were well into preparation of a lawsuit" before the party notified the opposing party of an intent to arbitrate";

3. "'whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay";

4. "'whether defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings";

5. "'whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place"; and

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court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: (a) The right to compel arbitration has been waived by the petitioner."

6. "whether the delay 'affected, misled, or prejudiced' the opposing party." 31 Cal. 4th at 1196.

4. *The Cowitts Waived the Right to Arbitration*

As stated above, in light of the strong policy that favors the enforcement of agreements to arbitrate, the party who asserts that there has been a waiver of the right bears a "heavy burden of proof." In this case, the Court finds that this burden has been met. This action was filed on June 13, 2008. The first Case Management Conference was conducted on October 21, 2008; the second on December 3, 2008. As explained above, at the December hearing, Judge Grimes set the matter for trial on July 20, 2009. The Cowitts filed their Petition to Compel Arbitration on June 9, 2009. This was more than a year after the action was filed, more than six months after the second Case Management Conference during which the Cowitts' counsel not only raised no objection to a trial, but supported the setting of a trial, and just 40 days prior to the scheduled trial. That the Cowitts waited so long to seek arbitration is itself problematic, especially given their conduct before the action commenced. And, their overall conduct fits precisely within factors 1, 2, 3, 5 and 6 set forth in *St. Agnes*.

Further, the Court finds, based on an evaluation of the conflicting evidence presented, that the Plaintiffs' version of the pre-litigation events is the more credible one. Thus, Plaintiffs' assertion that they sought to arrange a mediation, and were willing to participate in a second, non-mandatory one, but that the Cowitts failed to cooperate in the scheduling of either, is the more believable based on the

Court's evaluation of the competing evidence presented by the counsel for the respective parties. This conclusion is based on an assessment of all of the evidence presented as well as the assertions made by the parties' respective counsel to this Court in pleadings and during the hearings. The Court finds the statements of Kahn and Dorenfeld the more credible ones. What this demonstrates is that the Cowitts were slow to participate in any mediation, resisted an arbitration when it was demanded by Plaintiffs, and then sought to delay any court proceedings by resisting the timely scheduling of a further mediation. Then, on the eve of trial they filed the instant petition, which if granted would have resulted in a "start over," in the case. This would be prejudicial to Plaintiffs and would reward the tactics of the Cowitts.

It is not, however, only the Cowitts' delay in seeking arbitration that has led the Court to find a waiver. As the prior description of the hearings before Judge Grimes demonstrates, Diaz, the Cowitts' counsel, did not inform Judge Grimes that her clients opposed proceedings in the Superior Court. Indeed, Diaz not only acquiesced in the setting of a trial date, but supported the concept that doing so would likely lead to a resolution of the case.[8]

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8. That the Cowitts took advantage of the court processes is illustrated by this passage from the December 3, 2008 hearing, which is also quoted above: "The COURT: Well, obviously this case -- I mean, the likelihood of this case going to trial is less than 99.9 percent. You know, what I mean is to say, it's less than one percent. MS. DIAZ: 1 agree with you, your Honor. THE COURT: But nothing gets a case settled more than a firm trial date in a department where the judge is known for not continuing cases. MS. DIAZ: You know, June would be fine with me, your Honor." Tr 4:7-11.

During these same appearances before Judge Grimes, a mediation completion date was ordered by the Court with the support of Diaz. Once again, this demonstrates the use of the court's processes to the advantage of the Cowitts. The Cowitts also took advantage of the discovery process that occurred in the court proceedings. Diaz attended depositions and posed questions on behalf of the Cowitts.

That the Cowitts used the court processes and then sought to leave the court proceedings on the eve of trial also prejudiced the Plaintiffs. They expended time and incurred legal fees in connection with the court processes. They conducted discovery, participated in court-ordered mediation, and incurred costs in connection with the opposition of the Cowitts to the settling parties' motions for a finding of good faith settlements. In addition, because the matter was pending in the Superior Court for more than a year at the time of the filing of the petition, Plaintiffs had already identified their trial witnesses, including experts, and prepared all required trial documents as part of the process mandated by California law and the applicable rules of the Los Angeles Superior Court. In so doing, they incurred attorney's fees, some of which would not have been expended in an arbitration setting. Plaintiffs would be prejudiced were they now required to start over with an arbitration process. Not only would they have to re-incur some expenses, and bear others that were unnecessarily incurred, but they would be at a strategic disadvantage having disclosed trial witnesses and planned evidence to the Cowitts who did not reciprocate.

IV. *Conclusion*

For the reasons stated, the Court denies the Cowitts' Petition to Compel Arbitration. The right to demand arbitration was waived. This matter will proceed to trial on the schedule previously established by the Court at the July 23, 2009 hearing, i.e., on March 1, 2010.

It is so Ordered.

Dated: September 17, 2009

/s/
John A. Kronstadt

APPENDIX C — OPINION OF THE SUPREME COURT OF CALIFORNIA, DATED JANUARY 12, 2011

SUPREME COURT OF CALIFORNIA

S8188002

2011 Cal. LEXIS 63

MARK REILLY et al.,

Plaintiffs and Respondents,

v.

RICHARD L. COWITT et al., as Trustees, etc.,

Defendants and Appellants.

January 12, 2011, Filed

PRIOR HISTORY:
Second Appellate District, Division Four,
No. B220439
***Reilly**, et al. v. **Cowitt**, et al., 2010 Cal. App. LEXIS 1950 (Cal. App. 2d Dist., Nov. 2, 2010)*

JUDGES: CANTIL-SAKAUYE, Chief Justice.

OPINION: Petition for review & publication request(s) denied.

APPENDIX D — ORDER DENYING PETITION FOR REHEARING IN THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DATED NOVEMBER 2, 2010

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR

B220439

2010 Cal. App. LEXIS 1950

Reilly, et al. v. Cowitt, et al.

November 2, 2010, Filed

SUBSEQUENT HISTORY: Petition denied by, Request denied by *Reilly v. Cowitt, 2011 Cal. LEXIS 63 (Cal., Jan. 12, 2011)*

OPINION

Filed order denying petition for rehearing.